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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDGAR OMAR HERRERA FARIAS,

Defendant.

No. 4:15-cr-6049-EFS-16

DEFENDANT EDGAR OMAR  
HERRERA FARIAS'  
EXCEPTION TO  
PRELIMINARY JURY  
INSTRUCTION NO. 5

Edgar Omar Herrera Farias takes exception to the Court's Preliminary Jury Instruction No. 5, ECF No. 964. The instruction should include a third element: Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

It is Mr. Herrera Farias' position that Count 1 of Second Superseding Indictment charges a general conspiracy under 18 U.S.C. § 371, not a drug conspiracy under 18 U.S.C. § 846.

Count 1 of the Second Superseding Indictment charges the Defendants "did

1 knowingly combine, conspire, confederate and agree with each other and with others  
2 ... to commit the following offenses against the United States.” ECF No. 146. This is  
3 an element of the general federal conspiracy statute that makes it a crime to “conspire  
4 ... to commit any crime against the United States.” 18 U.S.C. # 371. It is not an  
5 element of conspiracy under 18 U.S.C. § 846. The en banc Ninth Circuit held in *United*  
6 *States v. Arlt*, 252 F.3d 1032 , 1036 (9th Cir. 2001), that the general conspiracy statute  
7 and the drug conspiracy statute are separate offenses.  
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10 Therefore, Count 1 charges are § 371 conspiracy that requires proof of an overt  
11 act. Accordingly, Preliminary Jury Instruction No. 5 should be changed to include the  
12 third element of a § 371 conspiracy, and overt act.  
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15 RESPECTFULLY submitted this 8<sup>th</sup> day of October 2018.

16 WALDO, SCHWEDA  
17 & MONTGOMERY, P.S.  
18 By: /s/ Peter S. Schweda  
19 PETER S. SCHWEDA  
20 Attorney for Defendant Herrera Farias  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 8, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Joseph H. Harrington  
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By: /s/ KATHLEEN SCHROEDER  
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